DePaul Law Review

Volume 18
Issue 1 *Fall 1968*

Article 2

Impeaching with Unconstitutionally Obtained Evidence: Some Reflections on the Palatable Fruit of the Poisonous Tree

Jeffrey Cole

IMPEACHING WITH UNCONSTITUTIONALLY OBTAINED EVIDENCE: SOME REFLECTIONS ON THE PALATABLE FRUIT OF THE POISONOUS TREE

JEFFREY COLE*

INTRODUCTION

TODAY, we are witnessing in the area of criminal procedure the sad spectacle of judges being swept along by pitiless and seemingly ineluctable logic to quixotic and unwise decisions. In all too many cases, good sense is sacrificed to technicality, and a sound principle is carried to an extravagant extreme.

The development and exegesis by the lower federal and state courts of the Supreme Court's decision in *Miranda v. Arizona*,[1] insofar as it applies to the use of illegally obtained evidence for impeachment purposes, illustrates this thesis nicely.

In *Miranda*, the Court held that pretrial statements are inadmissible in the prosecution's case-in-chief unless the defendant was properly informed of his right to remain silent and to have the aid of counsel. Relying on *Miranda*, some courts have recently held that illegally obtained statements are inadmissable even for purposes of impeachment. These holdings, however, appear to be at odds with the Court's earlier decision in *Walder v. United States*,[2] which carved out an exception to the exclusionary rule of the fourth amendment as enunciated in *Weeks v. United States*[3] and *Silverthorne Lumber Co. v. United States*.[4]

* MR. COLE *is a member of the Illinois Bar and received his J.D. from DePaul University in 1968. He is an attorney with the United States Department of Justice in the Organized Crime and Racketeering Section. He is a member of Who's Who in American Colleges and Universities and was an Associate Editor of the DePaul Law Review. The opinions of* MR. COLE, *as expressed in this article, do not necessarily reflect the position of the United States Department of Justice.*

[1] 384 U.S. 436 (1966).

[2] 347 U.S. 62 (1954).

[3] 232 U.S. 383 (1914). In *Weeks*, the Court held that evidence seized during an illegal search in violation of the fourth amendment was inadmissible in a federal court.

[4] 251 U.S. 385 (1920). In *Silverthorne*, the *Weeks* doctrine was expanded to prohibit the derivative use of evidence acquired during an illegal search and seizure.

In *Walder*, a prior narcotics indictment had been dismissed after the defendant had secured suppression of a heroin capsule obtained through an unlawful search and seizure. During his trial on a second narcotics offense committed two years later, the defendant voluntarily took the stand and during his own direct examination made a sweeping denial that he had ever had narcotics in his possession. The prosecution was then permitted to introduce the evidence obtained from the earlier search and seizure solely to impeach the defendant's credibility. On certiorari, the Supreme Court affirmed the conviction.

Mr. Justice Frankfurter, speaking for the Court, quickly laid to rest the petitioner's contention that allowing the Government to introduce illegally obtained evidence for impeachment purposes contravened the *Weeks* doctrine:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.[5]

The *Walder* rationale was not only eagerly embraced but also expanded by the federal courts to cover cases involving intangible evidence obtained in violation of the fifth and sixth amendments as well as tangible evidence obtained in violation of the fourth amendment.[6]

However, with the coming of *Miranda*, doubts arose regarding the continued viability of *Walder*. Today, the shadows of controversy are lengthening. While the courts are divided on the issue, the commentators have all concluded that *Miranda* has, if not *sub silentio* overruled *Walder*, at least seriously brought its rationale into question.[7]

The objections to extending the *Walder* rationale to embrace *Miranda*

[5] *Supra* note 2, at 65.

[6] United States v. Curry, 358 F.2d 904 (2d Cir. 1966), *cert. denied*, 385 U.S. 873 (1966); Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960); Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959).

[7] Pitler, *"The Fruit of the Poisonous Tree" Revised and Shepardized*, 56 CALIF. L. REV. 579, 630 (1968); Comment, *The Collateral Use Doctrine from Walder to Miranda*, 62 NW. U. L. REV. 912 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967); Note, *New York's Decision to Allow Impeachment in Order to Find Truth*, 13 N.Y.L.F. 148 (1967).

violations have been predicated on the following grounds: (1) the exclusionary rule of the fifth amendment as expressly enunciated in *Miranda* is irrecrusable; (2) *Walder* is antithetical to the deterrence rationale on which the exclusionary rules themselves are bottomed; (3) the *Walder* exception to the exclusionary rules may tend to discourage defendants from testifying; and (4) *Walder* is violative of the principle that the Government shall not profit from its own wrong or play an ignoble part.

While it is manifest that even the slightest *technical* or inadvertent violation of *Miranda* will render the evidence obtained inadmissable in the Government's case-in-chief, it is by no means true that such a *technical* violation[8] inexorably demands exclusion when the evidence is offered to impeach the defendant's direct testimony when that testimony is "collateral"[9] to the case itself, and when the defendant has initiated the inquiry.[10]

In this article, I shall attempt to demonstrate that the above mentioned objections to the *Walder* doctrine are based on a misunderstanding and misapplication of the principles involved. I shall also attempt to show that considerations of policy and justice demand that the exclusionary rule of the fifth amendment, as well as that of the fourth, admit of an impeachment exception in those instances where a mere *technical Miranda* violation has occurred, and the defendant has sought affirmatively to lie to the trier of fact.

[8] Throughout this article I shall use the phrase "technical violation" to refer to a *Miranda* violation which is inadvertent or unintentional and whose character in no way casts doubt on the voluntariness and reliability of the statements illegally elicited. Such a violation might occur where all the *Miranda* warnings were given save that dealing with the appointment of counsel in cases of indigency. *See, e.g.*, Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); United States v. Armetta, 378 F.2d 658 (2d Cir. 1967).

[9] The determination of "collateralness" does not seem to me to present especially difficult theoretical problems, and thus I have chosen to eliminate discussion of it. This determination, like so many others, must be made on an *ad hoc* basis and should be left to the court's discretion. For an analysis of the collateral matters rule, *see* Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U. L. REV. 912 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967).

[10] It is essential that the defendant be the initiator of the perjurious testimony in his direct examination. The government, on cross-examination, cannot ask a leading question designed to elicit the perjury. Such a question is improper and the government cannot impeach the defendant's answer with the illegally obtained evidence. Agnello v. United States, 269 U.S. 20 (1920). *Cf.* Douglas v. Alabama, 380 U.S. 415 (1965).

Miranda DOES NOT DEMAND TOTAL EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF ITS RULES

Great principles of constitutional law are not susceptible of statement in an adjective or of reification in a cunningly wrought sentence. Nor do the cases in which principles are contained reveal them merely for the asking. The task of discovering the hypostasis or the general principle in a case is rendered difficult since the "thing adjudged comes to us often times swathed in obscuring dicta, which *must be stripped off and cast aside.*"[11] Distinguishing between dicta and decision, between what was said and what was done, is nothing less than distinguishing between reason and rationality on the one hand and naked conclusions on the other.[12]

This distinction is neither esoteric nor invidious but is demanded by the "time-honored rules for reading cases—that cases hold only what they decide . . . that decisions are one thing, gratuitous remarks another. A stew may be a delicious dish. But a stew is not to be made into law by throwing together indiscriminately decision and dicta. . . ."[13] It also demanded by the oft-repeated and consistently followed principle of constitutional adjudication "not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, *Garner v. Louisiana*, 368 U.S. 157, 163 (1961). . . ."[14] This rule is but a corollary of Mr. Justice Frankfurter's exhortation that the Court's first duty is not to decide constitutional issues but to avoid them if at all possible.[15]

Just this past term, the Court demonstrated how vital it is to separate dicta from decision. In *Duncan v. Louisiana*,[16] the Court held that the due process clause of the fourteenth amendment guarantees the right to trial by jury in state criminal proceedings where serious crimes

[11] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 29 (1921) (emphasis added).

[12] *See* Bisso v. Inland Waterway Corp., 349 U.S. 85, 100 (1955) (Frankfurter, J., dissenting); United Gas Public Service Co. v. Texas, 303 U.S. 123, 144 (1938); Dayton Power and Light Co. v. Public Utilities Commission of Ohio, 292 U.S. 290, 302 (1934); Washington v. Dawson & Co., 264 U.S. 219, 228 (1924) (Brandeis, J., dissenting).

[13] Bisso v. Inland Waterway Corp., *supra* note 12.

[14] Wainright v. City of New Orleans, 392 U.S. 598 (1968) (Warren, C. J., dissenting). *See* Grosso v. United States, 390 U.S. 62, 83 (1968) (Warren, C. J., dissenting); Haynes v. United States, 390 U.S. 85, 101 (1968).

[15] United States v. Lovett, 328 U.S. 303, 320 (1946) (concurring opinion).

[16] 391 U.S. 145 (1968).

are involved. In answer to the assertion that *Maxwell v. Dow*,[17] *Palko v. Connecticut*,[18] and *Snyder v. Massachusetts*[19] contained statements that the right to trial by jury was not demanded by due process, the Court responded:

> In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important *dicta* asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. *These observations, though weighty and respectable, are nevertheless dicta*, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases. In *Malloy v. Hogan*, *supra*, the Court rejected *Palko's* discussion of the self-incrimination clause. Respectfully, we reject the prior *dicta* regarding jury trial in criminal cases.[20]

Thus, if we are to erect durable and proud constitutional edifices, the Supreme Court has made it clear that they must be built upon a foundation stronger than dicta. In short, the distinction between decision and dicta is a *sine qua non* of constitutional adjudication.

Yet, there is a tendency, perhaps a natural one, for judges to seize adventitious statements and to build upon them. Surely resort to dictum masquerading as precedent eases the work of a judge and satisfies a longing for certainty and repose. Yet, repose, as Holmes tells us, is not the destiny of man, and certainty is an illusion. And surely, no one will gainsay that unthinking reliance on dicta is a poor surrogate for enlightened analysis.

This penchant for relying on dicta to support a decision is clearly manifested today by those courts, both state[21] and federal,[22] which

[17] 176 U.S. 581 (1900).

[18] 302 U.S. 319 (1937).

[19] 291 U.S. 97 (1934).

[20] 391 U.S. at 145 (1968) (emphasis added). *Cf.* Mancusi v. Deforte, 392 U.S. 364 n.11 (1968).

[21] Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967); State v. Brewton, 422 P.2d 581 (Ore. 1967), *cert. denied*, 387 U.S. 943 (1967). *Contra*, People v. Kulis, 18 N.Y. 2d 318, 221 N.E.2d 541 (1966). The Illinois Supreme Court has expressly reserved decision on this point. People v. Luna, 37 Ill.2d 299, 226 N.E.2d 586 (1967).

[22] Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y.

have heard in *Miranda* the death knell of *Walder*. Relying upon Chief Justice Warren's tangential reference to impeachment,[23] they have concluded that *Miranda* has undermined *Walder*.

Most recently, the Court of Appeals for the Ninth Circuit, in *Groshart v. United States*,[24] in holding that no statement obtained in violation of *Miranda* can be used for any purpose whatsoever, promulgated a rule of total exclusion without regard to the degree or nature of the constitutional violation, and thus, *a fortiori*, without regard to the voluntariness and reliability of the prior statement. Since the *Groshart* opinion embraces and adopts the varying postures and approaches which have been taken in opposing the extension of *Walder*, the case will serve, in a sense, as a laboratory in which to analyze and evaluate these approaches as well as to examine the doctrinal underpinnings of *Walder*.

On April 10, 1966, appellant was arrested at the Mexican border after marijuana and amphetamine tablets were found in the station wagon he was driving. Prior to questioning, Groshart was properly advised of his fifth and sixth amendment rights as they existed prior to *Miranda v. Arizona*. The customs agent who was questioning Groshart did not, however, advise him that if he were indigent an attorney would be appointed to represent him, nor did he inform him that he had a right to the presence of counsel during any questioning.

During the course of the interrogation, appellant stated that an individual named "John" had requested that he drive to Mexico to pick up the contraband and bring it back in the station wagon which "John" provided. At the trial, however, Groshart testified on direct examination that he had borrowed the car from a friend who had in turn obtained

---

1967). *Contra*, United States ex rel. Kulis v. Mancusi, 272 F. Supp. 261 (1967), *aff'd per curiam*, 383 F.2d 405 (2d Cir. 1967), *cert. denied*, 389 U.S. 943 (1967); Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967); Fernandez v. Delgado, 257 F. Supp. 673 (D.C. Puerto Rico 1966).

[23] The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner . . . . In fact statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.
Supra note 1, at 476-77.

[24] 392 F.2d 172 (9th Cir. 1968). Subsequent to this writing, the Second and District of Columbia Circuits affirmed the *Groshart* rationale. United States v. Fox, — F.2d — (2d Cir. 1968); Procter v. United States, — F.2d — (D.C. Cir. 1968).

it from his friend. Groshart further testified that the car had been parked for 10 hours in Tijuana while he was sightseeing. This testimony was in direct conflict with the statements earlier given to the customs agent.

The statements given to the agent were excluded from the Government's case-in-chief on the basis of *Miranda* since that decision was held to apply to trials commenced subsequent to it.[25] However, the district court admitted, for impeachment purposes only, certain of the prior inconsistent statements relating to acquisition of the station wagon in which the contraband was found. The district judge punctiliously instructed the jury as to the limited purpose for which the evidence was received, and the earlier statements regarding "John's" request to Groshart to pick up the marijuana, *etc.*, were wholly excluded since they bore directly on the issue of guilt.

The jury found appellant guilty. On appeal, the circuit court reversed, holding that the district court erred in admitting the "illegally" obtained evidence even for the limited purpose of impeaching the appellant's credibility. The court held that the express language of *Miranda* forbids the use, under *all* circumstances, of evidence obtained in violation of the fifth amendment and also stated its belief that *Miranda* had "undermined" the rationale and validity of *Walder*.[26]

The court said that it found itself "*impelled* . . . by the force of *Miranda*"[27] to its conclusion "that if statements are obtained from a defendant in violation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, those statements, as well as any portions thereof, may not be used against the defendant at the trial for *any purpose whatsoever*."[28]

However, even the most laconic reading of *Miranda* dispels the notion that its language ineluctably demands that all evidence secured in *technical* violation of its rules be excluded in all situations. As the dissenting judge in *Groshart* pointed out: "[N]either in the main opinion, nor in any of the three dissenting opinions in *Miranda* is the word 'impeach' found, with the single exception of a tangential reference in the majority opinion."[29]

[25] Johnson v. New Jersey, 384 U.S. 719, 733-734 (1966).

[26] 392 F.2d at 178.

[27] *Id.* at 179 (emphasis added).

[28] *Id.* at 178 (emphasis added).

[29] *Id.* at 181. *See* note 23.

Certiorari was granted in *Miranda* "in order further to explore some facets of the problems thus exposed by *Escobedo v. Illinois* . . . of applying the privilege against self-incrimination to in-custody interrogation. . . ."[30] The Chief Justice, after exploring the inherently coercive effects of in-custody interrogation, went on to say that "[i]n the cases before us today, given this background, we concern ourselves *primarily* with this interrogation atmosphere and the evils it can bring."[31] "The *question* in these cases is whether the privilege is fully applicable during a period of custodial interrogation."[32] "[W]e [seek] a protective device to dispel the compelling atmosphere of the interrogation."[33]

Subsequently, the Court in *United States v. Wade*[34] made it clear that *Miranda* sought to obviate the inherent difficulties present in determining what goes on during in-custody interrogation by erecting procedural safeguards designed to ensure that a suspect's fifth amendment rights would be protected throughout such interrogation. The question relating to the admissibility of illegally obtained evidence for impeachment purposes was not before the Court in *Miranda*, and the Court did not pretend to deal with it.[35]

The statement of the Chief Justice in *Miranda* that "[t]he warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a defendant"[36] does, perhaps, lend some plausibility to the claim that prior inconsistent statements illegally obtained cannot be used even for impeachment purposes. An apparently equally unequivocal statement was made by Mr. Justice Holmes years earlier in *Silverthorne Lumber Co. v. United States*: "The essence of a provision forbidding acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court but that it shall not be used *at all.*"[37]

[30] *Supra* note 1, at 441.

[31] *Supra* note 1, at 456 (emphasis added).

[32] *Supra* note 1, at 460-461 (emphasis added).

[33] *Supra* note 1, at 465.

[34] 388 U.S. 218 (1966).

[35] Groshart v. United States, 392 F.2d 172, 180 (dissenting opinion); United States v. Armetta, 378 F.2d 658, 662 (2d Cir. 1967) (Friendly, J.); State v. Brewton, 422 P.2d 581, 583 (Ore. 1967) (dissenting opinion), *cert. denied*, 387 U.S. 943 (1967). *See* text relating to notes 41-42, *infra*.

[36] *Supra* note 1, at 476.

[37] 251 U.S. 385, 392 (1920) (emphasis added).

The petitioner in *Walder* relied extensively on Holmes' assertion. However, he failed to take cognizance of the disparate factual circumstances of his own case, as if the extenuating possibilities of the application of a rule in all its myriad diversities could be compressed within a formula. The petitioner's quest for certitude was so ardent that he was ready, and indeed obsecrated the Court, in essence, to pay an irrational reverence to a technique which used symbols of certainty or universal immutability though experience has taught that generalizations are delusive and universals slippery.

But to have found in Mr. Justice Holmes' words an immutable command to be obeyed, no matter what the attendant circumstances, rather than a prophecy to inspire, would have required the Court to ignore Holmes' entire legal philosophy, for he himself had discussed the "danger of reasoning from generalizations unless you have the particulars which they embrace in mind"[38] and had come to realize that "[a] generalization is empty so far as it is general."[39] Justice Frankfurter could hardly have embarked on such a barren enterprise, for no judge of modern times was more familiar with Holmes and his philosophy than he. Indeed, in Holmes he found both his hero and his inspiration. Thus, fully cognizant of the complexities and possibilities of injustice inherent in a changeless formula, and profoundly aware that no formula was meant to serve as a universal, Justice Frankfurter for the Court in *Walder* held that impeachment of a perjurious defendant could be achieved by the use of unconstitutionally obtained evidence if and when he initiated the inquiry by seeking to affirmatively lie to the trier of fact on direct examination.

If Justice Holmes' rather explicit statement in *Silverthorne* is not irrecrusable, then that of the Chief Justice in *Miranda* likewise should not be. Neither Justice Holmes in *Silverthorne* nor the Chief Justice in *Miranda* was addressing himself to the question of admissibility of illegally obtained evidence for impeachment purposes. *Miranda* itself has been the object of excoriation—its constitutional justifications the object of serious and penetrating analysis and questioning. Thus, to take a single oblique reference to impeachment from a lengthy and complex opinion, which did not even concern itself with the question of impeachment, and push it to its logical limits is unwarranted and unwise.

[38] Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899).

[39] *Id.*

Yet, notwithstanding all this, to the Government's contention that in *Miranda* the Supreme Court did not intend to forbid use by the prosecution of illegally obtained evidence under all circumstances, the court in *Groshart* answered:

> While this interpretation of the Court's language may be possible, we cannot accept it as correct. It would be a *strained interpretation*, an interpretation inconsistent with the Chief Justice's *direct reference* to the former use of such statements "to impeach" and with his immediately following injunction: "These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." 384 U.S. at 477, 86 S.Ct. at 1629.[40]

Yet, the court's rejection of the Government's request to distinguish between the *holding* and the *dicta* in *Miranda* is, as has been shown, contrary to the basic principles of constitutional adjudication and to the explicit commandments of the Court itself. It is, in part, this failure to discard dicta which has led the Ninth Circuit, as well as other courts, to an erroneous result.

Last term, the Supreme Court itself indicated that *Miranda* did not abrogate the use of illegally obtained statements for impeachment purposes. Mr. Justice White, dissenting in *Harrison v. United States* noted:

> Similarly, an inadmissible confession preceding a plea of guilty would taint the plea. And, as a final consequence, *today's decision* would *seem to bar the use of confessions defective under Miranda or Mallory from being used for impeachment when a defendant takes the stand and deliberately lies.*[41]

In response to this, Justice Stewart speaking for the majority stated:

> And, contrary to the suggestion made in a dissenting opinion today, . . . we decide here *only* a case in which the prosecution illegally introduced the defendant's *confession* in evidence against him at trial in its *case-in-chief*.[42]

Harrison, by implication, makes it clear that the Court regards the *Walder* exception to the exclusionary rules as at least unaffected by *Miranda*. Whether *Harrison* has affected the *Walder* exception is, of course, another question which will be dealt with later.[43] Thus, we must withhold our imprimatur from those decisions such as *Groshart* which

[40] 392 F.2d at 177-178 (emphasis added).

[41] 392 U.S. 219 (1968) (emphasis added).

[42] *Id.* at 219 n.9 (emphasis added).

[43] *See* note 68 *et seq.*, *infra*.

have relied so heavily on the dicta in *Miranda*. If, indeed the doctrinal underpinnings of *Walder* have been eroded, the erosion process must have proceeded under an impetus other than *Miranda*.

Walder WILL NOT ENCOURAGE VIOLATIONS OF THE FIFTH AMENDMENT

Since their inception, the exclusionary rules of the fourth and fifth amendments have been recognized as a principal mode of discouraging lawless police conduct. Thus, their major thrust is a deterrent one.[44]

Those who feel that *Walder* should be overruled, or at least not extended to *Miranda* situations, believe that *Walder* is dissonant with the spirit of the deterrence rationale. That is, they believe that even allowing statements obtained in *technical* violation of the *Miranda* rules to be introduced for impeachment purposes will encourage police misconduct. This kind of argument seems spurious, for it rests on the assumption that the police will now consciously violate *Miranda* in an attempt to obtain incriminating statements which the state may use for impeachment notwithstanding their knowledge that these statements are inadmissible in the state's case-in-chief.

One state court has, in effect, judicially noticed that:

> If we should today adopt a restrictive application of the exclusionary rule, the result could be a *major step backward*. This court would, in effect, be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus, the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand.[45]

This is an egregious piece of tendentious speculation. My unwillingness to accept this thesis stems not from any belief that police officers are the apotheosis of the Platonic "Guardians," for surely they are

[44] Harrison v. United States, 392 U.S. 219, n.10 (1968); Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walker, 381 U.S. 618, 629-635 (1965); Mapp v. Ohio, 367 U.S. 643, 655 (1961). *Compare* Lee v. Florida, 392 U.S. 378 (1968).

[45] State v. Brewton, 422 P.2d 581, 583 (Ore. 1967) (emphasis added), *cert. denied*, 387 U.S. 943 (1967).

not.[46] Rather, it stems from my inability to ascribe to them those Mephistophelean qualities and that degree of legal sophistication upon which such a hypothesis must necessarily rest.

To be sure, persons of speculative minds can employ sophisticated and persuasive arguments which suggest vague possibilities that the police will be encouraged to violate *Miranda* if *Walder* is extended to embrace intangible evidence. However, as a matter of good sense "[t]hat which is [obviously true] may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed."[47]

But beyond this, the example of the violation cited above by the Oregon Supreme Court is not one of a *technical* and inadvertent nature. On the contrary, it is a cold, deceptive, calculating attempt to violate a defendant's fifth amendment rights. No one would contend that statements elicited as the result of such conduct, the veracity and voluntariness of which are highly suspect, should be admitted even for the limited purpose of impeachment.[48] To the discriminating eye, the Oregon Supreme Court's analysis is not persuasive and its *ex-cathedra* pronouncements not especially edifying.

Neither *Walder*, nor any of the cases directly interpreting it, indicates that the principle of limited admissibility for collateral impeachment purposes is inapplicable when evidence is excluded because unconstitutionally obtained. An exclusionary rule, whether based on constitutional principles or not, is meant primarily to protect those accused of crime from unfair or unconstitutional police procedures by removing the strongest police incentive to use such procedures. Such a rule often results in excluding highly reliable evidence in order to ensure that those who enforce the law will not profit from violating the law. But it does not follow that, if such evidence is excluded for one purpose, it must be excluded for all purposes. It is enough to deter illegal police activity if the Government is prohibited from using evidence obtained by such activity to prove its direct case. In view of this adequate penalty, to deny the Government the use of voluntary,

[46] Police misconduct is so well known that it scarcely needs citation of authority. *See, e.g.*, Mr. Justice Frankfurter's opinion in Colombe v. Connecticut, 367 U.S. 568, 572 n.3 *et seq.* (1961).

[47] Billings v. United States, 232 U.S. 261, 284 (1914).

[48] United States v. Curry, 358 F.2d 904 (2d Cir. 1966), *cert. denied*, 385 U.S. 873 (1966).

reliable, prior inconsistent statements to impeach contrary testimony at trial would be an unnecesary impediment in the search for truth.

Thus, the fear that to interpret the exclusionary rule to permit the use of suppressed evidence for impeachment under the limited and circumscribed conditions detailed in *Walder* and its progeny would be so derogatory of the policy of the rule as to reduce the fifth amendment to a form of words is unfounded. No one has ever said that the Court's decision in *Walder* has in any way detracted from the vitality and protection of the exclusionary rule of the fourth amendment. The police have not been encouraged to violate the precepts of the fourth to gain incriminating evidence to be used for impeachment. The paucity of cases in this area testifies to this. And yet, this speculative cry of fear went up in 1953 just as it is going up today.

The fifteen-year history of the *Walder* rule in cases involving the fourth amendment is a persuasive argument against the claim that its application to fifth amendment cases will encourage illegal police activities. If *Walder* has not provided the impetus for law enforcement officials to violate the fourth amendment, then surely it does not follow that it will provide the motive force for violations of the fifth.

Reliance on the deterrence rationale is reliance on a slender reed for other reasons also. The deterrence rationale logically dictates that *all* unconstitutionally obtained evidence be excluded from criminal trials without regard to whether the defendant has standing to complain of the illegal activity of the police or not.[49] This of course would necessitate a total abolition of the rules relating to standing. The Supreme Court's reluctance to take this step clearly demonstrates that the deterrence rationale, like all concepts, is not an absolute, that its boundaries are measured by other considerations and policies, and that its efficacy can be impaired by misapplication.[50]

Beyond this, however, it is incongruous to assert that *Walder* is somehow antithetical to the deterrence rationale notwithstanding the Supreme Court's decision in *Chapman v. California*.[51] In *Chapman*, the Court promulgated a harmless-constitutional-error rule which recog-

[49] *See* Simmons v. United States, 390 U.S. 377 n.12 (1967); Mancusi v. DeForte 392 U.S. 364 (1968).

[50] In Terry v. Ohio, 392 U.S. 1 (1968), the Chief Justice noted: "The exclusionary rule has its limitations, however, as a tool of judicial control. . . . *Moreover, in some contexts the rule is ineffective as a deterrent.*" (emphasis added). *Id.* at 13.

[51] 386 U.S. 18 (1967).

nized "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[52] However, once a constitutional infraction has been shown, the Government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[53]

The *Chapman* rule was designed to obviate reversal as a mandatory remedy in cases involving errors of constitutional dimension and to substitute judgment for the *a priori* application of a rule of automatic reversal which was but an unnecessary concession to technicality and thus wholly antithetical to a jurisprudence of conceptions.[54]

Accepting the thesis that the deterrence rationale has an existence separate and apart from the more catholic doctrine that the Government shall not profit from its own wrong,[55] it is difficult to square *Chapman* with the deterrence rationale. Indeed, if the latter is pressed to its logical limits, reversal would appear to be mandatory. The Court, by its decision in *Chapman*, has made it clear, however, that what in effect is judicial excusal of police misconduct under certain circumstances will not encourage further police misconduct.

Thus, since *Chapman*, which allows convictions to stand, *non obstante* the state's introduction in its case-in-chief of unconstitutionally obtained evidence for the purpose of proving guilt, is not dissonant with the deterrence rationale, then *Walder*, which only deals with impeachment on "collateral matters," surely cannot be.

In summary, the concern that an extension of the *Walder* principle to embrace statements obtained in *technical* violation of *Miranda* will encourage police misconduct finds no support either in reason, experi-

[52] *Id.* at 22.

[53] *Id.* at 24.

[54] *See, e.g.*, Lockett v. United States, 390 F.2d 168 (9th Cir. 1968); Ethington v. United States, 379 F.2d 965 (6th Cir. 1967); Ware v. United States, 376 F.2d 717 (7th Cir. 1967). *Cf.* Wade v. United States, 388 U.S. 218, 242 (1966).

[55] Recently, Mr. Justice Harlan dissenting in Harrison v. United States, 392 U.S. 219 (1968) said: "Nor would I rule out the possibility that a direct product of unlawful official activity might properly be excludable as a fruit of that activity—even where the product is so unforeseeable that a deterrent rationale for exclusion will not suffice—on the ground that the Government should not play an ignoble part." *But see* Mr. Justice White's dissenting opinion in Harrison v. United States, 392 U.S. 219 (1968) and Mr. Justice Black's dissenting opinion in Bumper v. North Carolina, 390 U.S. 986 (1968).

ence, or judicial precedent. Such an extension will, in no way, frustrate the deterrent effect of the exclusionary rules.

THE *Walder* EXCEPTION TO THE EXCLUSIONARY RULES DOES NOT IMPEDE A DEFENDANT'S RIGHT TO TESTIFY

One of the more serious objections to extending the *Walder* rationale to cases involving *technical Miranda* violations concerns the possible inhibitory effect on a defendant's exercise of his right to testify. It was said in *Groshart* that the "ability of the prosecution to use portions of the statements illegally obtained from the defendant for impeachment purposes may . . . force the defendant to forgo his right to testify in his own behalf."[56]

However, conceding, *arguendo*, that a defendant in a criminal trial may well decide not to testify because he is aware that his "collateral" testimony may be impeached by illegally garnered evidence begins rather than ends the inquiry.

The court in *Groshart*, in laying inordinate and exclusive stress on the method by which the evidence was acquired made a fundamental and serious error, for, in effect, it failed to ask itself the proper question. Consequently, the court's answer was incorrect, for correct answers can never be obtained by asking the wrong question and thereby obfuscating the real one.

In answering the limited inquiry of whether *Walder* will impose an unconstitutional burden on a defendant's right to testify, the Ninth Circuit's attention should not have been directed to how the evidence was acquired, but rather to the question of whether the illegality of the method of acquisition imposed a burden on the defendant different either in kind or degree from that which would be imposed upon him had the evidence been obtained legally.

Phrased somewhat differently, the real question is whether a defendant would be less reluctant to testify in his own behalf had the evidence available for impeachment not been obtained illegally. When the problem is viewed in this, its proper perspective, it becomes clear that the "infringement on the right to testify" argument is predicated upon a misunderstanding of the principles involved. Perhaps a paradigm will illustrate this thesis.

[56] 392 F.2d at 180. *Accord*, State v. Brewton, 422 P.2d 581 (Ore. 1967), *cert. denied*, 387 U.S. 943 (1967).

Let us assume that certain statements were obtained from two defendants, *A* and *B*, and let us further assume that the statements were identical, that the prosecutions were for the same offense, that the statements were voluntary and reliable, and finally that *A*'s statements were obtained illegally[57] while those of *B* were obtained legally.

It may well be true that defendant *A* will be somewhat reticent about taking the stand and perjuring himself. However, this hesitancy is different neither in kind nor degree from that which defendant *B* experiences. The determination of both defendants to testify or not, in the example above, is wholly independent of the method by which the evidence available for impeachment against them was secured. Is it not now manifest that the illegal method by which the evidence was obtained can have no legal impact on *A*'s decision to testify or refrain from testifying, for the evidence available for impeachment purposes is identical in both cases. *A*, therefore, is placed under no greater legal burden than *B* in determining whether to take the witness stand.

To recapitulate, the legality or illegality of the method of acquisition of the evidence has absolutely no legal bearing on the specific and narrow question of whether *Walder* will cause a defendant to forgo his right to testify. It has been demonstrated that the decision to testify or refrain from testifying is, in legal contemplation, nowise predicated on the legality or illegality of the police action in securing the evidence. Rather, it is determined by a melange of imponderables which are loosely embraced by that time-worn phrase, "trial strategy."

This is not, of course, to assert that the illegality of the method of acquisition is unimportant in the ultimate determination of the broad question to which this article is addressed. It is merely to say that in playing not even a *soupçon* in a defendant's ultimate choice to testify, the conduct of the police cannot serve as a staging area from which to launch an attack against *Walder*—an attack predicated on the "infringement of the right to testify" argument. The illegality of police conduct becomes important in determining whether the *Walder* principle is antithetical to that most fundamental of propositions—namely, that the Government shall not profit from its own wrong or play an ignoble part. It also is important in deciding whether *Walder* is contrary to the "imperative of judicial integrity." I have, however, dealt with these questions elsewhere in the article.[58]

[57] The type of illegality referred to here would involve only a *technical Miranda* violation as described in note 8, *supra*.

[58] *See* note 85 *et seq.*, *infra*.

Once the specious nature of the "infringement on the right to testify" argument is made manifest, the arguments against *Walder* which are predicated upon the Supreme Court's decision in *Griffin v. California*[59] are rendered inapplicable. In *Griffin*, the Supreme Court, in holding that the fifth amendment prohibits comment on a defendant's failure to take the stand, stated that such comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[60] However, since, as has been shown, an illegal method of acquiring evidence imposes no greater burden on a defendant's right to testify than does a legal one, *Griffin* is inapposite.

In *Groshart*, the Ninth Circuit Court of Appeals predicated its assertion that *Walder* might force a defendant to forgo his right to testify on the Supreme Court's recent decision in *Simmons v. United States*,[61] in which it was held that statements given by a defendant in a suppression hearing could not be used by the Government "at the trial on the *issue of guilt*."[62]

The Court was sensitive in *Simmons* to the "Hobson's choice" faced by a defendant who wishes to assert his fourth amendment right but realizes that the price for such assertion may be the relinquishment of his fifth amendment right. The Court stated:

> It seems obvious that a defendant who knows that his testimony may be admissable against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. . . . [W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.[63]

This argument, as applied to *Groshart*, has a superficial plausibility on the word level, but if our attention is directed to substance rather than symbols the spuriousness of the argument is exposed.

In *Simmons*, the defendant was placed on the horns of a constitutional dilemma. If he chose one constitutional right, he had to forgo another.[64] Clearly, a defendant who has given statements without the full *Miranda* warning is not confronted with this "Hobson's choice" in

[59] 380 U.S. 609 (1965).

[60] *Id.* at 614.

[61] 390 U.S. 377 (1968).

[62] *Id.* at 390 (emphasis added).

[63] *Id.* at 392.

[64] *Compare* United States v. Woody, 379 F.2d 130 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 961 (1967).

determining whether he should testify. Nor, as we have seen, is he faced with any greater compulsion not to testify than is a defendant from whom the evidence was obtained legally.

In *United States v. Jackson*,[65] the Supreme Court held that the death penalty provision of the Federal Kidnapping Act[66] was unconstitutional, because, in making the risk of death the price for asserting the right to trial by jury, the provision thereby impaired the free exercise of that constitutional right.

Jackson, in principle, may be likened to *Griffin*, for both involved the imposition of an impermissible burden on the exercise of a constitutional right, with the "inevitable effect [being] . . . to discourage assertion of"[67] that constitutional right. But what was said earlier about *Griffin* applies with equal force to *Jackson*, and both cases are thus distinguishable from the *Walder* situation and in no way bolster the argument that the use of illegally obtained evidence causes a defendant to forgo his right to testify.

Unquestionably, the most significant Supreme Court decision to date, as regards the continued validity of *Walder* is *Harrison v. United States*.[68] There the petitioner was brought to trial before a jury in the District of Columbia upon a charge of felony-murder. At that trial, the prosecution introduced three confessions allegedly made by the petitioner while he was in the custody of the police. After these confessions had been admitted in evidence, the petitioner took the witness stand and testified to his own version of the events leading to the victim's death. The jury found the petitioner guilty, but the court of appeals reversed his conviction, holding that the petitioner's confessions had been illegally obtained and were therefore inadmissible in evidence against him.

Upon remand, the case again came to trial before a jury. This time the prosecutor did not offer the alleged confessions in evidence. But he did read to the jury the petitioner's testimony at the prior trial—testimony which placed the petitioner, shotgun in hand, at the scene of the killing. The testimony was read over the objection of defense counsel, who argued that the petitioner had been induced to testify at

[65] 387 U.S. 929 (1968).

[66] 18 U.S.C. § 1201(a).

[67] United States v. Jackson, 390 U.S. 570 (1968).

[68] 392 U.S. 219 (1968).

the former trial only because of the introduction against him of the inadmissible confessions. The petitioner was again convicted, and the court of appeals affirmed. The Supreme Court granted certiorari to decide whether the petitioner's trial testimony was the inadmissible fruit of the illegally procured confessions.

In *Harrison*, the Court did not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.[69]

> Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor. For the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392. . . . In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the court of appeals relied on the fact that the petitioner had "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in . . ." But that observation is beside the point. The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.[70]

The argument that the detractors of *Walder* will attempt to make is the converse of that made in *Harrison*. In *Harrison*, the Court found that "the petitioner's trial testimony was in fact *impelled* by the prosecution's wrongful use of his illegally obtained confessions."[71] The converse of this argument is that a defendant is "impelled" not to take the stand because of the wrongful actions of the police in obtaining statements from him in violation of *Miranda*.

This argument is, however, legally dysgenic. In *Harrison*, the Gov-

[69] *Accord*, People v. Luna, 37 Ill.2d 299, 226 N.E.2d 586 (1967).

[70] 392 U.S. 219, 222-223 (1968).

[71] *Id.* at 224 (emphasis added).

ernment exacerbated its original illegality by offering "tainted" evidence at the trial.[72] In such a case the causal connection between the Government's improper introduction of the illegally obtained confessions and the defendant's decision to testify is manifest.

"The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring *he released* was effective to the exclusion of all others."[73] After quoting this statement of Justice Cardozo, the Court in *Harrison* went on to say that "[h]aving 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony."[74]

The *Walder* situation is totally distinguishable from *Harrison*, the latter more closely resembling *Agnello v. United States*[75] and *Fahy v. Connecticut*.[76] In a *Walder* situation the Government does not introduce any evidence at all. The decision to testify or refrain from testifying is not "impelled" by any action on the Government's part. Contrast this with the situation presented by *Harrison*, *Agnello*, and *Fahy*. In each of those cases, the Government, through *affirmative action*, was the prime mover, the initiator of the defendant's conduct.

Another salient distinction which causes the *Harrison* situation to sharply contrast with a *Walder* situation involves the nature of the evidence being used, and the use to which that evidence is put. In *Harrison*, the Court was dealing with the use of an improperly obtained *confession* offered by the Government in its *case-in-chief* to prove *guilt*. The Supreme Court has always viewed confessions as particularly weighty with the jury.[77]

In a *Walder* situation, however, the evidence introduced is not a confession but rather deals only with matters "collateral" to the crime. Moreover, the evidence is used not in the *case-in-chief* to prove *guilt*

[72] *Cf.* Burgett v. Texas, 389 U.S. 109 (1967); Douglas v. Alabama 380 U.S. 415 (1965); Agnello v. United States, 269 U.S. 20 (1920).

[73] Harrison v. United States, 392 U.S. 219 (1968).

[74] *Id.* at 225.

[75] 269 U.S. 20 (1920).

[76] 375 U.S. 85 (1963).

[77] Miller v. California, 392 U.S. 616 (1968) (Marshall, J., dissenting); Jackson v. Denno, 378 U.S. 368 (1964); Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting); Bram v. United States, 168 U.S. 532 (1897).

but only for *impeachment* of the defendant's *credibility*. The Court, in *Harrison*, took pains to point out that it was deciding "here only a case in which the prosecution illegally introduced the defendant's *confession* in evidence against him at trial in its *case-in-chief*."[78]

In order for the *Harrison* rationale to give succor to the argument that extending the *Walder* principle to embrace *Miranda* violations would "impel" a defendant to forgo his right to testify, the defendant's reticence would have to be classified as a "fruit" of the original police misconduct. To carry the "fruit of the poisonous tree" rationale so far would be both extravagant and unwise.

However, even assuming that the argument is viable, I believe *Harrison* is nontheless inapposite. In *Nardone v. United States*,[79] Mr. Justice Frankfurter, speaking for the Court, said:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.[80]

If we substitute the phrase "illegal activity" for "illicit wire-tapping" and replace the words "Government's proof" with "the defendant's reluctance to testify," it is manifest that any causal connection between a *technical Miranda* violation and a defendant's unwillingness to testify has "become so attenuated as to dissipate the taint." Nor, can it be argued that the defendant has been forced to forgo a constitutional right by the Government's "exploitation of [the initial] illegality."[81]

Thus, the notion that to allow the use of illegally obtained evidence for the limited purpose of impeachment on "collateral" matters would somehow have an inhibitory effect on the defendant's taking the stand is a spider's web which the first breath of analysis blows away. This limited use would only preclude the defendant from taking advantage of the Government's error to testify falsely. That is, where a defendant seeks to profit from the Government's error to affirmatively lie to the trier of fact, the rule of exclusion should not be invoked to preclude the prosecution from nullifying the effect of such perjurious testimony.

[78] 392 U.S. 219, 223 (1968) (emphasis added).

[79] 308 U.S. 338 (1939).

[80] *Id.* at 341.

[81] *Cf.* Wong Sun v. Unted States, 371 U.S. 471, 488 (1963). *See* cases cited in note 72, *supra*.

By wisely limiting the application of the exclusionary rule, a defendant will be deprived of nothing to which he is lawfully entitled. All that is denied him is a license to perjure himself. Justice cannot suffer by a limitation of the rule in the narrow circumstances outlined earlier; rather, it will be defeated by a Procrustean application.

The *Groshart* rule of total exclusion ignores the basic principle that a witness impeached on the basis of prior inconsistency "may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it."[82] It incorrectly presupposes that juries lack the judgment and good sense necessary to distinguish between a defendant's veiled attempts at deception and his honest and sincere explanations of the prior inconsistency. Whatever cogency such an argument may possess as applied to jury trials surely shivers into nothingness when we are dealing with a bench trial. I believe, as did Mr. Justice Frankfurter, that most judges, especially federal ones, possess "a high standard of professional competence, good sense, fairness and courage" when it comes to impartiality in the receipt and use of evidence.[83] Surely receipt of evidence solely for purposes of impeachment on "collateral" matters does not require discrimination so subtle that it is a feat beyond the capabilities of an experienced judicial mind.[84] Indeed, if judges and juries cannot make such discriminations, then all our legal processes are but exercises in futility.

More importantly, the rule of total exclusion is too parochial in scope, for it would render the courts of the United States impotent to cope with perjury. In effect, it gives a defendant the unbridled license to commit perjury with impunity. It blindly allows a frontal assault on the integrity of the federal judiciary in the name of constitutionality. It is an unwise progeny, conceived in haste and born of misunderstanding.

Walder IS NOT VIOLATIVE OF THE PRINCIPLE THAT THE GOVERNMENT SHALL NOT PROFIT FROM ITS OWN WRONG

In the world of concepts and ideas, as elsewhere, there is a tendency toward the reproduction of kind. Hence, every judgment has a gen-

[82] 3 WIGMORE, EVIDENCE § 1044 (3d ed. 1940); United States v. Scandifia, 390 F.2d 244, 250 (2d Cir. 1968).

[83] Michelson v. United States, 335 U.S. 469, 488-489 (1948) (concurring opinion). *Accord*, McNabb v. United States, 318 U.S. 332, 346-347 (1942).

[84] *Compare* Shepard v. United States, 290 U.S. 96 (1933); Bruton v. United States, 391 U.S. 123 (1968) and authorities cited therein.

erative power and a directive force for future cases of even a similar nature. Once declared, the judgment is a progenitor of a new stock of descent; it is charged with a vital force; it is the well-spring from which new principles or norms may evolve, uniting with other strains and permeating the interstitial tissue of the law.

Logic, perhaps more than any other principle of selection, guides the progression of development of concepts, for it has the primacy that comes from natural and orderly logical succession.[85] Yet, while extending a legal principle by a process of purely logical deduction may satisfy our craving for certainty, we must be cautious not to stray too far from our starting point save where the words of the precedent import a policy that goes well beyond them. Thus, mere "[a]cquiescence in a precedent [such as *Miranda*] does not require approval of its extension,"[86] for "[t]he Constitution commands neither logical symmetry nor exhaustion of a principle."[87]

A determination as to whether a given precedent should be carried to its logical conclusion, or, if not, where the line limiting its growth should be drawn, can only be made after an examination of the ends which the judgment subserves, for an appeal to origins, to naked precedent, will be vain, its significance perverted, unless tested and illumined by an appeal to ends.

In failing to properly assess the ends which the exclusionary rule of the fifth amendment as enunciated in *Miranda* seeks to achieve, the Ninth Circuit in *Groshart* committed a grievous error—one which, I believe, led to its erroneous conclusion. Just as "[w]e must look to the purpose of our new standards . . . and the effect on the administration of justice"[88] to determine retroactivity, so too must we carefully examine the purpose of the exclusionary rules and the effect of a particular application of them before we can determine whether they are to admit of any exceptions. Mere resort to a sterile dialectic will not suffice, for as Mr. Justice Holmes once said, "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the

[85] *Cf.* CARDOZO, THE GROWTH OF THE LAW 56 (1924); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9 (1921); SCHAEFFER, THE SUSPECT AND SOCIETY 8 (1966).

[86] Dennis v. United States, 339 U.S. 162, 181 (1949) (Frankfurter, J., dissenting).

[87] Hughes v. Superior Court, 339 U.S. 460, 468 (1949).

[88] Johnson v. United States, 384 U.S. 719, 727 (1966). *See also* Linkletter v. Walker, 381 U.S. 618 (1965).

grounds for desiring that end are stated or are ready to be stated in words.[89]

What then are the ends which the exclusionary rules of the fourth and fifth amendments seek so assiduously to achieve and, in the final analysis, are the constitutional foundations underlying the rules? They seek, of course, to ensure Government's respect for the dignity, inviolability, and integrity of its citizens.[90] But, beyond this, their real and chief predicates are deterrence of police misconduct and the "imperative of judicial integrity."[91] This latter concept has, since its first explicit enunciation in *Elkins v. United States*,[92] assumed a vital role in constitutional theory. Thus, it appears that the "interests in the administration of justice and the integrity of the judicial process" are sought also to be protected by the exclusionary rules.[93]

The Government cannot, of course, violate the commands of the fifth amendment and use the fruits of such unlawful conduct to secure a conviction any more than they can violate the fourth amendment and profit therefrom. Nor may the Government use the fruits of its illegal conduct indirectly any more than it can directly.[94] However, while "[i]t is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained[,] [i]t is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths."[95] "The tyranny of labels . . . must not lead us to leap to a conclusion that a . . . [violation] which in one set of facts may stand for oppression or enormity is of like effect in every other."[96]

[89] *The Path of the Law*, 10 HARV. L. REV. 457, 468-469 (1897).

[90] Miranda v. Arizona, 384 U.S. 436, 460 (1966); Walder v. United States, 347 U.S. 62 (1954); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[91] Terry v. Ohio, 392 U.S. 1 (1968); Harrison v. United States, 392 U.S. 224, n.10 (1968); Bumper v. North Carolina, 391 U.S. 543 (1968) (Black, J., dissenting); Linkletter v. Walker, 381 U.S. 618 (1965).

[92] 364 U.S. 206 (1960).

[93] *See* cases cited in note 91, *supra*. *See* Miranda v. Arizona, 384 U.S. 436, 466 (1966); Johnson v. New Jersey, 384 U.S. 719, 728-729 (1965). *Cf.* Burgett v. Texas, 389 U.S. 109, 117 (1967) (Warren, C.J., concurring).

[94] Walder v. United States, 347 U.S. 62 (1954).

[95] *Id.* at 65.

[96] Palko v. Connecticut, 302 U.S. 319, 323 (1937) (Cardozo, J.).

Mr. Justice Frankfurter's solution to the problem presented by *Walder* is in effect a recognition that the "integrity of the fact-finding process" is just as susceptible to attack from the unbridled perjury of a defendant as from any illegal activity of Government, and that the attacks of the former are no less rapacious or destructive than those of the latter. Indeed, the former may ultimately have an internecine effect far beyond our imagination.

By excluding illegally obtained evidence from the Government's case-in-chief, the exclusionary rules remove the incentive for the police to employ illegal procedures in their fact-gathering process and thereby achieve, at least partially, the twin desiderata on which these rules are based. However, by interpreting the exclusionary rules to demand that unconstitutionally seized, though reliable, evidence be inadmissible for impeachment of "collateral" matters, part of the basic policy upon which the rules rest is thwarted, for perjury would now be condoned, and the "integrity" of the federal judiciary would be in serious jeopardy.

It would be a sorry spectacle to see criminal defendants taking the stand and committing perjury with impunity while the courts stood helplessly by, fettered by a rule of their own making, a rule which is neither commanded by the constitution nor by any sound principle of justice.

The importance of protecting the integrity of the courts from being undermined by the nefarious acts of defendants in criminal cases received the attention of the Supreme Court just recently in *Osborn v. United States*.[97] In *Osborn*, the petitioner was endeavoring to bribe a member of a jury panel in a prospective criminal trial. The individual whom the petitioner had approached to contact a member of the jury panel informed the Government of the petitioner's illegal offer. Subsequently, he made an affidavit which was shown to two judges of the district court. These judges then authorized electronic surveillance of Osborn. The Court described the situation thusly:

> The situation which faced the two judges of the district court when they were presented with Vick's affidavit on November 8, and the motivations which prompted their authorization of the recorder are reflected in the words of Chief Judge Miller. As he put it, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I have been on the bench. I decided that some action had to

[97] 385 U.S. 323 (1966).

be taken to determine whether this information was correct or whether it was false. It was *the most serious problem that I have had to deal with since I have been on the bench.* I could not sweep it under the rug."

So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense *directly and immediately affecting the administration of justice in the federal court*, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, *it was imperative to determine whether the integrity of their court was being undermined. . . .*[98]

Assuming that the evidence obtained by the Government is wholly reliable, there is no reason for allowing a criminal to undermine the "integrity of the court" by perjuring himself. The integrity of our legal system suffers no less by what occurred in *Groshart* and *Walder* than by what was attempted in *Osborn.* The Constitution of the United States was never intended as a facility for crime. It is intended to prevent oppression, and "[t]here is a danger that, if the [courts do] not temper [their] doctrinaire logic with a little practical wisdom, [they] will convert the Bill of Rights into a suicide pact."[99]

Those who decry the *Walder* exception to the exclusionary rules have relied heavily on Justice Brandeis' eloquent dissent in *Olmstead v. United States*[100] where he argued that illegally obtained evidence should be excluded:

[I]n order to maintain respect for law; in order to promote confidence in the administration of justice; and in order to preserve the judicial process from contamination . . . . In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent omnipresent teacher; for good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[101]

Of course, I accept the underlying idea of what is surely a noble principle, and I suppose no one would deny it. Indeed, it is but an

[98] *Id.* at 329-330 (emphasis added).

[99] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[100] 277 U.S. 438, 471 (1928).

[101] *Id.* at 484-485.

exquisite expression of the concept which is perhaps the touchstone of our legal system: the Government shall not profit from its own wrong. However, uncritical acceptance of such a generalization or formula can never adequately solve complex and concrete questions, for as Mr. Justice Holmes has said, "[G]eneral propositions do not decide concrete cases."[102]

But beyond this, there is a danger in blithely accepting "lovely" phrases, for there is a tendency whereby phrases are made to do service for critical analysis by being turned into dogma. Thus, "[r]eady-made catch-phrases may conceal but do not solve serious constitutional problems. 'Too broadly generalized conceptions are a constant source of fallacy.' Holmes, J., in Lorenzo v. Wirth, 170 Mass. 596, 600."[103]

Mr. Justice Brandeis' entire professional life, both at the Bar and on the Bench, was devoted to analysis and reason, to combatting the tyranny of labels and of absolutes. He, no less than Justice Holmes before him and Justice Frankfurter after him, sought to inculcate into legal ratiocination the idea that no formula is meant to serve as a universal, that no formula or generalization will ever be adequate to meet great constitutional tasks unless its breadth of view and flexibility of adaptation are fitted and proportioned to the specific scheme and purpose. Is it not therefore clear that to eviscerate some of that great Justice's words from an opinion and to rely on their general tenor for the solution of a specific constitutional problem is precisely the thing he warned against doing? Does this not then do a disservice to a great Justice, as well as degrade a noble principle, by making it the handmaiden to an ignoble purpose? There can, of course, be but one answer.

The fallacy of the arguments which seek, on the basis of the *Olmstead* dissent, to overturn *Walder* can be traced to the improper rephrasing of the problem into terms to which, as lawyers, the judges and commentators have become accustomed. Then, by treating the question as though it were the rephrased issue, the facile answer appears axiomatic and, because familiar, authorative. Thus, the argument runs: use of illegally obtained evidence for impeachment purposes allows the government to profit by its own wrong; the government shall not be allowed to profit by its own wrong; therefore, the government cannot use illegally obtained evidence for impeachment purposes. The syllo-

[102] Lochner v. New York, 198 U.S. 45, 76 (1904).

[103] Shapiro v. United States, 335 U.S. 1, 50-51 (1947) (Frankfurter, J., dissenting).

gism is insidiously persuasive at first blush. However, subtle question-begging is still question-begging, and the apparent exactness is delusive nonetheless.

Thus, the question which must be answered is under what circumstances will the government, in *legal contemplation*, be deemed to have profited from its own wrong. It was to this question which Justice Frankfurter in *Walder* addressed himself.

The situation presented by *Walder* is wholly distinguishable from that contemplated by the Holmes-Brandeis dissents in *Olmstead*. In every case, save *Walder*, in which the Supreme Court has dealt with affronts to the "integrity of the fact-finding process," the affront was initiated by the government; that is, the government had violated a defendant's constitutional rights and had then attempted to exploit that illegality and gain an advantage therefrom. The defendant in such situations had played an entirely passive or quiescent role.

How very different is this from the *Walder* situation. There the government made no attempt to capitalize on its initial illegality. Indeed, there was no sin of commission here save on the part of the defendant who sought to profit from his own and the government's improper actions.[104]

Thus, in holding that in such a case the government is not precluded from impeaching the defendant with the illegally obtained evidence, Justice Frankfurter was tacitly saying that the government had not, in *legal contemplation*, profited from its own wrong or played an ignoble part. Hence, when the government does not seek to affirmatively use tainted evidence either in its direct examination of the defendant or under the "guise" of cross-examination, it has not violated these principles espoused by Justices Holmes and Brandeis in their dissents in *Olmstead*.

Mr. Justice Frankfurter's decision in *Walder* is not inconsistent with the Holmes-Brandeis dissents. The briefest survey of the Justice's constitutional philosophy supports the theory that *Walder* is perfectly consistent with the *Olmstead* dissents.[105] Mr. Justice Frankfurter accepted the principles espoused by Holmes and Brandeis in *Olmstead* throughout his judicial career. Indeed, his own frequent enunciation of

[104] *Compare* Dennis v. United States, 384 U.S. 855 (1966).

[105] *See* the articles collected in 76 HARV. L. REV. 1-24 (1962). This issue was dedicated to Mr. Justice Frankfurter.

them may have even surpassed in clarity, lambency, and richness of expression those of his illustrious predecessors.[106] Thus, to assert that *Walder* is somehow violative of those principles requires the incredible conclusion that Justice Frankfurter himself was either indifferent to or misunderstood them.

Those who would rely on the words of Justices Brandeis and Holmes in *Olmstead* to support their cause[107] would do well to delve beyond the superficial import of the words of the phrase, the government shall not profit from its own wrong or play an ignoble part, and to treat these words not as ends but as vehicles to convey meaning. And, they would do well to remember that "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary in color and content according to the circumstances and the time in which it is used."[108]

THE STANDARDS WHICH DETERMINE ADMISSIBILITY IN THE CASE-IN-CHIEF ARE NOT THE SAME AS THOSE WHICH DETERMINE ADMISSIBILITY FOR IMPEACHMENT

Some courts have attempted to distinguish *Walder* from *Miranda* on the invidious ground of the differences in "reliability of the evidence" obtained by the respective violations. Indeed, the court in *Groshart* admitted that "it may be that there are *noteworthy* differences regarding the *reliability* of the evidence depending upon whether it consists of statements obtained through police interrogation or of the tangible fruits of a search and seizure."[109]

To be sure, reliability of evidence is of salient importance in determining whether or not the government should be allowed to use the tainted evidence to impeach. Certainly, tangible evidence obtained in violation of the fourth amendment is irrefragibly reliable. Thus, not to allow such evidence for impeachment would allow and encourage

[106] On Lee v. United States, 343 U.S. 747, 758 (1952) (dissenting opinion); Sherman v. United States, 356 U.S. 369, 378 (1957) (concurring opinion); Harris v. United States, 331 U.S. 145, 155 (dissenting opinion); McNabb v. United States, 318 U.S. 332 (1943).

[107] *See* note 7, *supra.*

[108] Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

[109] 392 F.2d 172 n.5 (1968) (emphasis added). *Accord*, Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968).

perjury by the defendant. The "integrity" of our judicial system demands that this not be tolerated.

But is a statement gained by a *technical* violation of *Miranda* any less reliable? "It is true that if a prior admission were found to be unconstitutionally coerced, the substantial probability that the admission is no more reliable than the contrary testimony of the accused at trial should lead a court to proceed with caution in permitting its use for impeachment purposes.[Cite omitted] But where . . . there is no good reason to believe that a prior inconsistent statement was not accurate and voluntary, . . . the *Walder* principle [should be] controlling."[110]

In acknowledging the importance of reliability, as a criterion in determining admissibility of illegally seized evidence for impeachment purposes, where the violation is of the fourth amendment, the Ninth Circuit in *Groshart* has, by implication, demonstrated the importance of protecting the federal judiciary against a defendant who would seek to turn the illegal method by which evidence in the government's possession was obtained to his own advantage and provide himself with a shield against contradictions of his own untruths. It has also manifested the untenability of the argument which seeks to distinguish the exclusionary rule of the fourth from that of the fifth amendment.

To contend that the fifth amendment's exclusionary rule is irrecrusable while that of the fourth is not, is surely to move into the world of Alice in Wonderland. Such a view is necessarily dependent upon an antecedent determination that the fifth amendment protects a more profound complex of values than does the fourth and therefore ranks higher in the constitutional hierarchy. Yet, such a scale of respective values is chimerical; it simply is nonexistent. Whatever posture one may take as to the "preferred position" argument regarding the first amendment,[111] it is clear that the fifth and the fourth are on equal constitutional footing. Indeed, the Supreme Court has said that the fourth and fifth amendments run "almost into each other"[112] and "enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) . . . only after years of struggle.' "[113]

[110] United States v. Curry, 358 F.2d 904, 912 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1965). *But see*, United States v. Fox, — F.2d — (2d Cir. 1968).

[111] Jones v. Opelika, 316 U.S. 584 (1942).

[112] Boyd v. United States, 116 U.S. 616, 630 (1886).

[113] Malloy v. Hogan, 378 U.S. 1, 9 (1964).

Since the exclusionary rule of the fourth amendment does not preclude the government wholly and absolutely from using evidence illegally obtained, then that of the fifth surely should not. Thus, the real question is not merely whether there has been a violation, and surely, not what amendment has been violated. The real question is whether the evidence obtained is possessed of sufficient reliability so that in order to prevent perjury and open affronts to the fact-finding process it should be admissible for impeachment purposes where "collateral" matters only are involved. And, surely, not all statements obtained in violation of *Miranda* fail to possess the requisite degree of reliability so that they must be excluded when offered for impeachment rather than affirmative case-in-chief purposes. While it is true that *Miranda* was designed to obviate the *ad hoc* determination of the question of voluntariness of statements given during in-custody interrogation, it does not necessarily follow that the same policy must or should be applied when the issue is use of evidence for impeachment rather than affirmative case-in-chief purposes, for the considerations and interests involved differ markedly.

CONCLUSION

Thus, in certain instances, the law and society are better served when flexible standards, capable of being individualized to meet the needs of varying conditions, take precedence over the obdurate rule with its mechanical application. The process of adjudication, especially constitutional adjudication, is a phase of an incessant movement. Consequently, something more is demanded of those who are to play their proper role in it than imitative reproduction, the lifeless repetition of a mechanical routine. Those who denigrate *Walder* should pause for a moment and realize that all constitutional questions present a choice of nicely balanced alternatives, each possessing weighty title deeds. Yet, true constitutional statesmanship calls not for a selection of one, *vis-à-vis* the other, but rather for an accommodation of both. I believe that Mr. Justice Frankfurter, in *Walder*, achieved a workable accommodation between the rival principles, and thus we should pause long and thoughtfully before abandoning the *Walder* rationale.